Maslinda bt Ishak v Mohd Tahir bin Osman & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01–156 OF 2008
SURIYADI, SULAIMAN DAUD AND JEFFREY TAN JJCA
1 SEPTEMBER 2009

Tort — Negligence — Vicarious liability — First respondent snapped photographs of appellant urinating — Whether done in course of duty — Whether second, third and fourth respondents vicariously liable

The first respondent was a member of RELA (Angkatan Relawan Rakyat Malaysia), the second respondent, the Director General of RELA, the third respondent, the Director of the Jabatan Islam Wilayah Persekutuan Kuala Lumpur ('JAWI') and the fourth respondent, the Government of Malaysia. The appellant was arrested in a joint operation by the officers of the second and third respondents. The appellant together with some other persons were arrested and put in a truck. Enroute to Taman Maluri, Cheras the appellant requested permission from the officers attached to the second and third respondents to use the toilet facility. Her request was denied and she was reprimanded and told to ease herself in the truck. The appellant who could not control her bladder asked her friends to shield her from the view of others in the truck by encircling her with a shawl before the appellant eased herself on the truck. At that juncture, the first respondent opened the door of the truck, rushed in and pulled down the shawl. He then snapped numerous photos of the appellant squatting and urinating. The whole incident was within the view of everyone in the truck. The appellant pleaded that the officers had negligently failed to protect her well being by allowing the first respondent to snap the photographs. The learned High Court judge found that the first respondent together with several other members of RELA who participated in the operation carried out by JAWI, did so in their official capacity but the first respondent was never ordered to photograph any person arrested, and that the first respondent was the owner of the camera. The learned High Court further opined that the act of taking pictures of the appellant urinating was not part of the duty of the first respondent and hence, concluded that the second, third and fourth respondents were not vicariously liable for such acts by the first respondent. The appellant, dissatisfied with the findings, appealed against the unsuccessful litigation against the second, third and fourth respondents. The appellant sought relief against the respondents on the basis of them being jointly and severally liable. The appellant's contention, based on factual basis against the respondents, were (i) that the

first respondent was RELA officer at the material time and the second respondent was the director of RELA (ii) the fourth respondent had admitted that it was vicariously liable for the actions of the second respondent but only to the extent of ss 5 and 6 of the Government Proceedings Act 1956 (iii) at the time the pictures were taken the first respondent was in the process of carrying out his duty as instructed to him by the third respondent. However, the second, third and fourth respondents submitted that the photographs did not show the appellant in the act of urinating and further contended that there was no connection between the act of the first respondent and the duties for which he was entrusted to do. Further argument submitted against the appellant was that the usage of the camera by the first respondent had nothing to do with his duties and his action was a 'frolic of his own'.

Held, allowing the appeal with costs here and below:

(1) The admission by the second, third and fourth respondents that the first respondent was a RELA officer together with the admission that the second respondent was the director of RELA had established a relationship among the first, second and fourth respondents (see para 10(a)).

(2) In order to be held liable for the negligent act of its officer there must be proceedings against the officer personally. Sections 5 and 6 of the Government Proceedings Act 1956 had been complied with, in that there were proceedings against the first respondent. Hence, the relationship between the first respondent and fourth respondent had been established; *Mohd Nor Afandi bin Mohamed Junus v Rahman Shah Alang Ibrahim & Anor* [2008] 3 MLJ 81 followed (see para 10(b)).

(3) The third respondent should be vicariously liable for the first respondent's act of taking the photographs which occurred when the said operation was still in progress. The fact that the learned High Court judge had decided against the first respondent showed that the appellant had established all the necessary ingredients for a case based on a balance of probability nullified the claim that the photographs did not show the appellant in the act of urinating on the truck (see para 20).

(4) The first respondent was not there on his own volition but on instruction. He not only was under the direct supervision of RELA, but on that particular night the first respondent was also subject to the direction of JAWI, with his duties shuttling from ensuring the security of those who participated in the exercise and to keeping an eye over those arrested. As the first respondent took the unauthorised photographs, whilst in the course of the work or employment for which he was instructed to carry out, at a time when the operation was in

progress, the second, third and fourth respondents must be held vicariously liable. The evidence of snapping the photographs being so closely connected to the first respondent's duties was overwhelming. The second, third and fourth respondents must jointly and severally bear burden of the first respondent's liability. It is trite law that when an injury or loss is caused to a third person by the wrongful act of an agent acting within the scope of his authority his principal is jointly and severally liable with him; *Yeo Tin Sang v Lim Choo Kee* [1961] MLJ 23 followed (see paras 20–21).

[Bahasa Malaysia summary

Responden pertama merupakan ahli RELA (Angkatan Relawan Rakyat Malaysia), responden kedua merupakan Ketua Pengarah RELA, responden ketiga merupakan Pengarah Jabatan Agama Islam Wilayah Persekutuan Kuala Lumpur ('JAWI') dan responden keempat merupakan Kerajaan Malaysia. Perayu telah ditangkap dalam operasi bersama oleh pegawai-pegawai kepada responden-responden kedua dan ketiga. Perayu bersama dengan beberapa orang lain telah ditangkap dan dimasukkan ke dalam trak. Dalam perjalanan ke Taman Maluri, Cheras perayu telah meminta kebenaran pegawai-pegawai yang menangkap yang terikat dengan responden-responden kedua dan ketiga untuk menggunakan kemudahan tandas. Permintaannya ditolak dan dia telah ditegur dan disuruh membuang air kecil dalam trak itu. Perayu yang tidak dapat menahan dirinya meminta rakan-rakannya mengadangnya daripada pandangan yang lain dalam trak itu dengan selendang sebelum perayu membuang air kecil atas trak itu. Pada ketika itu, responden pertama telah membuka pintu trak, bergegas masuk dan menarik selendang itu. Dia kemudian mengambil beberapa gambar perayu mencangkung dan membuang air kecil. Keseluruhan kejadian itu disaksikan oleh semua orang yang berada dalam trak itu. Perayu memplid bahawa pegawai-pegawai tersebut telah gagal secara cuai untuk menjaga kebajikannya dengan membenarkan responden pertama mengambil gambar-gambar tersebut. Hakim Mahkamah Tinggi yang bijaksana mendapati bahawa responden pertama bersama beberapa ahli RELA lain yang terlibat dalam operasi yang dilaksanakan oleh JAWI, berbuat demikian dalam kapasiti rasmi mereka tetapi responden pertama tidak diarahkan untuk mengambil gambar orang-orang yang ditangkap, dan bahawa responden pertama adalah pemilik kamera itu. Hakim Mahkamah Tinggi yang bijaksana selanjutnya berpendapat bahawa tindakan menangkap gambar perayu sedang membuang air kecil bukan sebahagian daripada tugas responden pertama dan justeru itu, memutuskan bahawa responden kedua, ketiga dan keempat tidak bertanggungjawab secara vikarius untuk tindakan sedemikian oleh responden pertama. Perayu yang berasa tidak puas hati dengan penemuan itu telah merayu terhadap litigasi yang tidak berjaya itu terhadap

responden-responden. Perayu memohon relief terhadap responden pertama dan juga responden-responden lain atas dasar mereka secara bersama dan berasingan adalah bertanggungjawab. Hujah perayu, berdasarkan asas faktual terhadap responden-responden, adalah: (i) bahawa responden pertama merupakan pegawai RELA pada masa matan dan responden kedua adalah pengarah RELA; (ii) responden keempat telah mengakui bahawa ia bertanggungjawab secara vikarius kerana tindakan-tindakan responden kedua tetapi hanya setakat ss 5 dan 6 Akta Prosiding Kerajaan 1956; dan (iii) pada masa gambar-gambar itu diambil responden pertama dalam proses melaksanakan tugasnya seperti yang diarahkan kepadanya oleh responden ketiga. Walau bagaimanapun, responden-responden kedua, ketiga dan keempat menghujahkan bahawa gambar-gambar itu tidak menunjukkan perayu sedang membuang air kecil dan selanjutnya menegaskan bahawa tiada kaitan antara tindakan responden pertama dan tugas-tugas yang diamanahkan kepadanya untuk dilaksanakan. Tambahan pula alasan yang dihujahkan terhadap perayu bahawa penggunaan kamera oleh responden pertama tiada kaitan dengan tugas dan tindakannya hanyalah 'frolic of his own.'

Diputuskan, membenarkan rayuan dengan kos di mahkamah ini dan Mahkamah Tinggi:

(1) Pengakuan oleh responden-responden kedua, ketiga dan keempat bahawa responden pertama merupakan pegawai RELA bersama dengan pengakuan responden kedua yang merupakan pengarah RELA telah membuktikan hubungan antara responden-responden pertama, kedua dan keempat (lihat perenggan 10(a)).

(2) Untuk memutuskan bahawa pegawainya adalah bertanggungjawab kerana tindakan yang cuai itu perlu ada prosiding terhadap pegawai itu secara peribadi. Seksyen-seksyen 5 dan 6 Akta Prosiding Kerajaan 1956 telah dipatuhi, di mana terdapat prosiding terhadap responden pertama. Justeru itu, hubungan antara responden pertama dan responden keempat telah dibuktikan; *Mohd Nor Afandi bin Mohamed Junus v Rahman Shah Alang Ibrahim & Anor* [2008] 3 MLJ 81 diikut (lihat perenggan 10(b))

(3) Responden ketiga patut bertanggungjawab secara vikarius untuk tindakan responden pertama yang mengambil gambar-gambar yang berlaku apabila operasi tersebut masih dijalankan. Hakikat bahawa hakim Mahkamah Tinggi yang bijaksana telah memutuskan terhadap responden pertama menunjukkan bahawa perayu telah membuktikan semua kandungan yang perlu untuk kes yang berdasarkan imbangan

kebarangkalian membatalkan dakwaan bahawa gambar-gambar itu tidak menunjukkan perayu sedang membuang air kecil atas trak tersebut (lihat perenggan 20).

(4) Responden pertama berada di situ bukan atas kerelaannya sendiri tetapi atas arahan. Dia bukan sahaja di bawah penyeliaan terus RELA, tetapi pada malam tersebut responden pertama juga tertakluk kepada arahan JAWI, dengan tugas-tugasnya, yang antaranya memastikan keselamatan mereka yang terlibat dalam operasi itu dan juga mengawal mereka yang telah ditangkap. Memandangkan responden pertama telah menangkap gambar-gambar tanpa kebenaran semasa menjalankan tugas atau pekerjaan yang mana dia telah diarahkan untuk melaksanakannya, pada masa apabila operasi dijalankan, responden-responden kedua, ketiga dan keempat hendaklah dipertanggungjawabkan secara vikarius. Keterangan menangkap gambar-gambar itu yang amat berkaitan dengan tugas-tugas responden pertama begitu jelas. Responden-responden kedua, ketiga dan keempat hendaklah secara bersama dan berasingan menanggung beban liabiliti responden pertama. Adalah undang-undang tetap bahawa apabila kecederaan atau kerugian disebabkan oleh pihak ketiga kerana tindakan salah seorang ejen yang bertindak dalam skop kuasanya, prinsipalnya bertanggungjawab secara bersama dan berasingan dengannya; *Yeo Tin Sang v Lim Choo Kee* [1961] MLJ 23 diikut (lihat perenggan 20–21).]

Notes

For cases on vicarious liability, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1536–1537.

Cases referred to

Canadian Pacific Railway Co v Lockhart [1942] AC 591, PC (refd)
Dyer v Munday [1895] 1 QB 742, CA (refd)
Goh Choon Seng v Lee Kim Soo [1925] AC 550, PC (refd)
Keppel Bus Co Ltd v Sa'ad bin Ahmad [1972] 2 MLJ 121, CA (folld)
Keppel Bus Co Ltd v Sa'ad bin Ahmad [1974] 1 MLJ 191, PC (refd)
Mohd Nor Afandi bin Mohamed Junus v Rahman Shah Alang Ibrahim & Anor [2008] 3 MLJ 81, CA (folld)
Rose v Plenty [1976] 1 All ER 97, CA (refd)
Roshairee bin Abdul Wahab v Mejar Mustafa bin Omar & Ors [1996] 3 MLJ 337; [1997] 2 AMR 2044, HC (refd)
Samin bin Hassan v Government of Malaysia [1976] 2 MLJ 211, FC (refd)
Yeo Tin Sang v Lim Choo Kee [1961] MLJ 23, CA (folld)

Legislation referred to

Government Proceedings Act 1956 ss 5, 6
Penal Code s 509

Appeal from: Civil Suit No S4–21–132 of 2003 (High Court, Kuala Lumpur)

Karpal Singh (Sangeet Kaur Deo with him) (Karpal Singh & Co) for the appellant.
Amarjeet Singh a/l Serjit Singh (Senior Federal Counsel, Attorney General's Chambers) for the respondents.

Suriyadi JCA (delivering judgment of the court):

[1] The appeal was unanimously allowed with costs here and below. We found the second, third and fourth defendants ('the respondents') vicariously liable, jointly and severally, and ordered the sum of RM100,000 ordered by the learned judge of the High Court against the first defendant to remain unvaried. The deposit, was also refunded to the plaintiff ('the appellant').

[2] The appeal came about as the appellant had filed an action against the first defendant and the three respondents. The appellant's claim for, inter alia, general, aggravated and exemplary damages, was allowed in the above sum of RM100,000 solely against the first defendant, but not against the respondents. Being dissatisfied, the appellant filed an appeal as against the unsuccessful litigation against the respondents. There was no appeal filed by the first defendant regarding the sum of RM100,000 against him or for that matter by the respondents. It was on account of wanting to avoid any confusion of the respective relevant parties that we deliberately referred to the respective parties as the appellant, first defendant, and respondents (the second, third and fourth defendants).

[3] A perusal of the amended statement of claim shows that the relief sought against the first defendant and the respondents were on the basis of them being jointly and severally liable. With the respondents off the hook, and the first defendant a man of straw, that judgment would have remained a paper judgment, as openly admitted by counsel for the appellant. The other facts adduced in the statement of claim, and not disputed are that, the first defendant was a member of the RELA (Angkatan Relawan Rakyat Malaysia), the second respondent was the Director General of RELA, the third respondent was the Director of the Jabatan Agama Islam Wilayah Persekutuan, Kuala Lumpur ('JAWI') and the fourth respondent is the Government of Malaysia.

[4] It was pleaded that at about 11.30pm on 21 March 2003 the appellant was arrested at the Kelab De Vegas at Jalan Imbi, Kuala Lumpur in a joint operation by officers of the second and third respondents. The appellant, together with some other persons arrested, were then put into a truck and

driven off to Taman Maluri, Cheras. Enroute the appellant had requested from officers of the second and third respondents permission to use the toilet facilities but was disallowed. Instead she was scolded and told to urinate in the truck. As she was in quite a state, she asked her friends to shield her by encircling her with a shawl, in order to ease herself. At that particular moment, the first defendant suddenly opened the door of the truck, rushed in, pulled down the shawl and proceeded to take numerous photos of the appellant in a squatting position urinating. As a result, the appellant was thoroughly humiliated with the whole incident, which was within the view of everyone in the truck.

[5] There was abundance of evidence as regards this invasion of privacy, amongst others, his subsequent prosecution for a charge under s 509 of the Penal Code under Arrest Case C83–494 of 2003. He pleaded guilty and was convicted of it. He was accordingly sentenced to four months jail vide, with the sentence confirmed by the High Court vide a revision. In fact, this issue of the invasion of privacy was never under challenge.

[6] To return to the pleadings, the appellant pleaded that her privacy had been invaded, resulting in her humiliation, trauma and serious mental anguish. She wanted general, aggravated and exemplary damages in the sum of RM5,000,000, interest and costs from the first defendant and the respondents. She pleaded that the officers of the second and third respondents at the material time, had negligently failed to protect her well-being, by allowing the first defendant to snap those photographs. To reiterate, at the end of the trial, the learned judge found for the appellant only as regards the first defendant, but not the rest of the respondents. Neither did the first defendant nor the respondents appeal against that decision.

[7] The learned judge in her grounds of judgment found that the first defendant, together with several members of RELA who participated in the operation carried out by JAWI, did so in their official capacity. On the other hand the first defendant was never ordered to photograph any person arrested, let alone the camera used was his. His action of taking pictures of the appellant urinating was not part of his duty to ensure security but a personal one. The learned judge concluded that the respondents therefore were not vicariously liable for the acts of the first defendant.

[8] Perusing the memorandum of appeal, much of the grounds registered were related to the learned judge's finding of facts, but come the hearing day before us, learned counsel emphasised more on the finding that the action of the first defendant was a 'frolic of his own'. The relevant portion of those finding of facts read:

ini kerana tindakan defendan pertama mengambil gambar plaintif tidak mempunyai sebarang kaitan dan tidak kena mengena dengan tugasnya, mengawal keselamatan pada malam tersebut.

[9] We now reproduce the thrust of the appellant's submission on the issue of 'frolic of his own', and it reads as follows:

> ... the test where vicarious liability is concerned is whether the act was done 'in the course of business'. Not whether the employer authorised the act or knew that it was being done. In this case, in light of the finding of the learned High Court judge that the first defendant, was in fact at the operation in his official capacity as a RELA officer, his actions of taking the said photographs were in fact done in the course of business. It is humbly submitted that at the time the pictures were taken the first defendant was in the process of carrying out his duty as instructed to him by the third defendant. This is admitted by SD2 (he succinctly said: 'apabila kejadian ini berlaku en setuju Md Tahir itu masih diperlukan untuk mengawal — masih dalam arahan en — Ya'). He was specifically instructed by the third defendant to control those who had been arrested. In the course of doing that, the first defendant took the said photos. As it was the first defendant's duty to control those detained, it is submitted that he was in fact in charge of the plaintiff at the time. It is submitted that when the act of taking the photographs occurred the operation was still in progress. Although the said act may have been unauthorised by the third defendant, it was carried out during the normal course of duty of the first defendant as instructed by the third defendant.

[10] There was factual basis of the appellant's contention against the respondents as:

(a) they had admitted that the first defendant was a RELA officer at the material time. Further it was admitted that the second respondent was the director of RELA. With the first defendant being a RELA officer he thus came under the second respondent's control (these admissions had thus established a relationship between the first defendant, the second respondent and the fourth respondent);

(b) pertaining to the relationship between the first defendant and the fourth respondent, the latter had admitted that it was vicariously liable for the actions of the second respondent, but only to the extent of s 5 and s 6 of the Government Proceedings Act 1956. To be held liable for the negligent act of its officer, there must be proceedings against the officer personally. In this case, s 5 and s 6 of the Government Proceedings Act 1956 had been complied with, in that there were proceedings against the first defendant then (*Mohd Nor Afandi bin Mohamed Junus v Rahman Shah Alang Ibrahim & Anor* [2008] 3 MLJ 81). The relationship between the first defendant and the fourth respondent thus had been established; and

(c) at the time the pictures were taken, the first defendant was in the process of carrying out his duty as instructed to him by the third respondent ie to control those who had been arrested. In the course of doing so, the first defendant took the said photos. The act of taking the photographs occurred when the said operation was still in progress and therefore, the third respondent should be equally vicariously liable.

[11] Federal counsel for the respondents began, as per the written submission that the photographs did not show the appellant in the act of urinating. The oral testimony was a fabrication and had been discredited by the documentary evidence. This at best was an unusual submission as both parties had agreed, and admitted further in the statement of defence, that she indeed did urinate in the truck. The fact that the learned judge decided against the first defendant shows that the appellant had established all the necessary ingredients for a case based on a balance of probability. The learned judge in her grounds of judgment elucidated, 'Saya mendapati bahawa tindakan defendan pertama mengambil gambar-gambar plaintiff yang *sedang membuang air kecil* ... (Emphasis added.),' in no uncertain terms established that a finding of fact had been made. As there was no appeal on this finding, it was too late in the day for the respondent's counsel to touch on the facts, which culminated in that submission. Apart from that unusual submission, counsel wanted the RM100,000 damages award be set aside, when there was no appeal filed against it.

[12] As regards the issue of vicarious liability, in support of the learned judge's conclusion, he ventilated that the first respondent was not acting in the course of employment and was in pursuit of his own misguided and personal aims when attempting to photograph the appellant. Learned federal counsel further ventilated that:

> The test to determine vicarious liability is established law and is not in dispute. In this appeal the question is whether the use of the camera by the first respondent was 'so closely connected with the acts that he was authorised to that, for the purposes of liability of the Government as his employer, his wrongful use may fairly and properly be regarded as made by him while acting in the ordinary course of employment'. If the wrongful act is not so connected then the employer is not responsible.

(a) *Bernard v Attorney General* [2005] 2 LRC 561;

(b) *Attorney General of the British Virgin Islands v Craig Hartwell* [2004] 1 WLR 1273;

(c) *Lister & Ors v Hesley Hall Ltd* [2001] 2 All ER 769;

(d) *Keppel Bus Co Ltd v Sa'ad bin Ahmad* [1974] 1 WLR 1082;

(e) *Keppel Bus Co Ltd v Sa'ad bin Ahmad* [1972] 2 MLJ 121.

> The approach is to concentrate on the relative closeness of the connection between the nature of employment and the particular tort (*Bernard v Attorney General* [2005] 2 LRC 561). At the end of the day every case will be decided on its own peculiar facts.
>
> The fact that the employment provides the employee with the opportunity to perform the act does not necessarily mean that the act was within the scope of employment. There must be some greater connection between the tortuous act of the employee and the circumstances of employment than the mere opportunity to commit the act which has been provided by the access to the premises which the employment afforded (*Lister & Ors v Hesley Hall Ltd* [2001] 2 All ER 769).

[13] In conclusion learned federal counsel submitted that there was no connection between the act of the first respondent and the duties for which he was entrusted. The usage of the camera had nothing to do with his duties and its use was a 'frolic of his own'.

[14] Perusing the submissions of the parties, it was no surprise to see that both parties had supplied some near similar cases and, on that excuse we refer to some of them. In *Dyer v Munday* [1895] 1 QB 742 (CA) Lord Esher MR ruled:

> The liability of the master does not rest merely on the question of authority, because the authority given is generally to do the master's business rightly; but the law says that if, in the course of carrying out his employment, the servant commits an excess beyond the scope of his authority, the master is liable.

In the same case Lopes LJ remarked:

> The law says that for all acts done by a servant in the conduct of his employment, and furtherance of such employment, and for the benefit of his master, the master is liable, although the authority that he gave is exceeded.

[15] In *Goh Choon Seng v Lee Kim Soo* [1925] AC 550, apart from holding the same view as above, held that where a servant did some work for which he was appointed to do, but did in a manner not authorised, and would not have authorised had he known it, the master was nevertheless liable.

[16] The principle of the employer being responsible for the act of its employee, in the course of his employment, was applied in its full force in *Keppel Bus Co Ltd v Sa'ad bin Ahmad* [1972] 2 MLJ 121. In that case, the Court of Appeal of Singapore found that there was sufficient evidence for the trial judge to conclude that the conductor in hitting the respondent in a very high handed manner, was acting in the course of employment. The learned CJ had adverted to the Canadian case of *Canadian Pacific Railway Co v*

Lockhart [1942] AC 591. When the matter went up to the Privy Council the decision of the trial judge was overturned on the premise that there was insufficient evidence to support the conclusion arrived at. What is relevant is Lord Kilbrandon's remarks in *Keppel Bus Company Ltd v Sa'ad bin Ahmad* [1974] 1 MLJ 191, where he opined:

> There is no dispute about the law. The Court of Appeal relied on the well-known passage from *Salmond on Torts*, which was approved in *CPR v Lockhart* at p 599; it is not necessary to repeat it.
>
> The Court of Appeal rightly point out that the question in every case is whether on the facts the act done, albeit unauthorised and unlawful, *is done in the course of employment*; that question is itself a question of fact. (Emphasis added.)

[17] So what is 'in the course of employment?' Certainly in the course of his specific work for which he is employed qualifies. In *Samin bin Hassan v Government of Malaysia* [1976] 2 MLJ 211 the driver of a Telecoms Department vehicle was negligent and had caused injuries to the appellant. He had allegedly taken the vehicle for a trial run to test the brakes. The court found as a fact that the driver had taken out the vehicle for his own purpose ie he had gone home for lunch with it. When dismissing the appeal the Federal Court had occasion to opine:

> This appeal is concerned with the liability of the master for his servant. The master should shoulder the servant's liability if at the material time the servant was acting in the course of the employment and for the business of the employer. The meaning of the words 'in the course of employment' was fully considered by the House of Lords in *Davidson v M Robb*, and the headnotes of the law reports read:
>
> > 'In the course of employment' does not mean during the currency of the engagement, but means in the course of the work which the workman *is employed to do* and what is incidental to it and absence on leave for the workman's own purposes is an interruption of the employment. (Emphasis added.)

[18] In the same case, Suffian LP referring to *Rose v Plenty* [1976] 1 All ER 97 referred to Lord Denning's remarks which read, inter alia, as follows:

> In considering whether a prohibited act was within the course of employment, it depends very much on the purpose for which it was done. If it is done for his employer's business it is usually done in the course of his employment, even though it is a prohibited act …

[19] We now would like to refer to a case that has some legal similarities to the facts of this appeal. In *Roshairee bin Abdul Wahab v Mejar Mustafa bin Omar & Ors* [1996] 3 MLJ 337; [1997] 2 AMR 2044 the plaintiff was

assaulted by the first and second defendants while undergoing an orientation programme at Kem Lok Kawi, a military camp in Sabah. At the material time, the plaintiff was under the charge of the first defendant, who was assigned as a duty officer to carry out the orientation programme. The second defendant was attached to the said regiment stationed in the said camp. Both defendants denied the plaintiff's claims but the learned judge found for the plaintiff. He further opined:

> Though the first defendant's acts of assault were unauthorised by the third defendant, they were carried out during the normal course of duty of the first defendant. Such being the case, his unauthorised acts have become so connected with his authorised acts that this court finds them to have become 'modes-although improper modes of doing them'. For this, the third defendant (the Government of Malaysia–supplied) must be held vicariously liable for the unlawful actions of this defendant.

[20] In this case the learned judge had made a finding that the first defendant's presence on the scene was on an official capacity. Apart from being a RELA member, and thus an employee of the Government of Malaysia having certain responsibilities to the country, he was also there to specifically assist JAWI to carry out its operation. The witness for JAWI clearly stated that he was in charge of a group of fifteen JAWI and five RELA officers and had admitted in cross-examination, 'saya setuju pada malam itu En Tahir bertindak atas arahan saya'. The first defendant therefore was not there on his own volition but on instruction. He not only was under the direct supervision of RELA, but on that particular night was also subject to the direction of JAWI, with his duties shuttling from ensuring the security of those who participated in the exercise, and to keeping an eye over those arrested. As he took the unauthorised photographs, whilst in the course of the work or employment for which he was instructed to carry out, at a time when the operation was in progress, the respondents must be held vicariously liable. In a nutshell, the evidence of snapping the photographs being so closely connected to his duties not only was overwhelming, but fitted well with the remarks of Lord Kilbrandon of *Keppel Bus Co Ltd v Sa'ad bin Ahmad*. Our conclusion of the first defendant's principals being vicariously liable is also in consonant with the submission of learned federal counsel that 'at the end of the day, every case will be decided on its own peculiar facts'.

[21] With the above findings concretised the respondents must jointly and severally bear the burden of the first defendant's liability. It is trite law that when an injury or loss is caused to a third person by the wrongful act of an agent acting within the scope of his authority his principal is jointly and severally liable with him (*Yeo Tin Sang v Lim Choo Kee* [1961] MLJ 23).

[22] Based on all the above reasons we allowed the appeal with costs.

Appeal allowed with costs here and below.

Reported by Mashrifah Ravendran